SUPREME COURT, U.S.
FILED
SEP 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-5932

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

JOHN DOE AND JANE ROE,

Appellants,

v.

STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF DELAWARE

REPLY BRIEF FOR APPELLANTS JOHN DOE AND JANE ROE

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September 1980

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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This reply brief first addresses issues, relating to the merits of the case, presented by the State's answering brief ("State Br."). It then addresses other issues raised by the State or the amici.[1]

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[1]Amici briefs have been submitted by the American Civil Liberties Union ("ACLU Br."); the American Orthopsychiatric Association, *et al.* ("AOA Br."); the New York Legal Aid Society ("Legal Aid Br."); and the National Association of Counsel for Children, *et al.* ("NACC Br."). So far as they address the constitutional issues presented in appellants' opening brief, all amici appear to support the appellants' position.

I.

TERMINATION OF THE DOES' PARENTAL RIGHTS IS UNCONSTITUTIONAL FOR EACH OF THE THREE SEPARATE REASONS STATED IN THE OPENING BRIEF.

A. The State's Brief Has Misstated Significant Facts.

The State's "statement of the case" reflects a colorful but inaccurate version of the facts. Several of the State's factual errors were anticipated and answered in the Does' opening brief ("Doe Br.")[2] and others are unimportant. However, a few additional inaccuracies were not anticipated, are significant, and do in light of the issues presented deserve a response.

The State suggests that the Does demonstrated a lack of concern for their children prior to and during the TPR proceeding. State Br. 6-7. The truth is to the contrary. The Does went so far as to undergo sterilization procedures on the understanding that this would assist them in regaining their children. Doe Br. 7. They sought to visit their children after the State took them away, but the State refused to respect the visitation rights originally provided for by the custody order (see Doe Br. 10 & n.17); and they began

[2]For example, there is no finding below, and the evidence does not establish, that Doe had a "history of alcohol problems" (compare State Br. 2 with Doe Br. 9 & n.14, 42), or sexually toyed with his infant daughter (compare State Br. 5 with Doe Br. 6) or "emotionally damaged" her (compare State Br. 5 with record citation at Doe Br. 10 indicating that it was State foster care including nine changes of foster placement that injured her).

contempt proceedings against the State to enforce those visitation rights which the State then succeeded in eliminating. *Id.* They have also pursued this litigation through two hearings and three appeals because of their concern for their children.

The State also infers a lack of concern on the ground that "the children have not seen [the Does] for five years . . . ." State Br. 20. The fact is that the Does have not seen their children because the State has not revealed their whereabouts and has resisted visitation rights. Although the Does did seek a stay of the TPR order pending appeal following the full hearing in the Superior Court, the State successfully resisted the stay application.[3] Doe motion to stay pending appeal, Dec. 7, 1977; State answer, Dec. 14, 1977.

Finally, the State implies that the children are now in foster homes where they could or would be adopted if the termination of parental rights becomes final. State Br. 9-10. This Court cannot fairly consider such an assertion. The State successfully resisted at trial any consideration of what would happen to the children if termination occurred (see J.S. App. 15a; Tr. 352-62, 367, Dec. 20, 1976) and there is nothing in the record about their present status. Moreover, the State has refused to give lead counsel for the Does access to records that would disclose what has happened to the children since they were taken from their parents.

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[3]The State also asserts that at oral argument in the Delaware Supreme Court in 1978 the parents' counsel did not know where they were. State Br. 20. In fact, counsel talked with both parents within a few weeks before oral argument and met with Jane Roe personally. Counsel not only knew where the parents were living but it is his best recollection that he gave that information to the Delaware Supreme Court at the outset of oral argument. *Cf.* J.S. App. 5a.

B. The Delaware Statute Is Unconstitutionally Vague.

The Does' opening brief demonstrated that the Delaware statute is unconstitutionally vague in terminating parental rights based solely on standards of unfitness and best interests. The State responds that the Delaware Supreme Court has explicated the concepts of unfitness and best interests so that "narrowing court interpretations" rescue the statute. State Br. 14-15. The short answer to this argument is that the Delaware Supreme Court affirmatively refused to offer a narrowing construction: it asserted below that "precise definition" was not required (J.S. App. 7a), and earlier it had declared that "each case must be decided on its own peculiar facts." *In re Dingee,* 328 A.2d 139, 140 (Del. 1974).[4] Certainly the Superior Court in this case gave no sign that it was aware of or was applying any narrowing construction of the Delaware statute.

The State also asserts that similarly vague language has been used in TPR statutes by a number of states in the past (State Br. 14), but longevity is not an excuse for perpetuating constitutional error. Especially where human rights are concerned, this Court has not hesitated to reverse even its

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[4]Similarly, the State's brief cannot construct a "narrowing" interpretation by stringing together scraps of statements from Delaware decisions which include circular assertions of the Delaware Supreme Court that "not fitted" means "unfitted" (J.S. App. 7a) or that "the attending circumstances" must be considered in each case. *In re Dingee, supra,* 328 A.2d at 140, paraphrasing *Clarke v. Lyon,* 118 N.W. 472 (Neb. 1908).

own prior constitutional decisions where appropriate.[5] This Court has never upheld a TPR statute against a vagueness attack, so no change in position is involved. Where, as here, other state statutes and model codes have shown that flexibility can be combined with greater guidance, there is no excuse for tolerating the Delphic standards used by Delaware, standards providing judges and litigants alike with virtually no guidance or predictability.

The State misreads Mr. Justice Stewart's reference to unfitness and best interests if it interprets his statement as an endorsement of those terms against a charge of undue vagueness.[6] The reference occurred in a passage refuting as a matter of substantive law the notion that the State could separate parents and children merely because the State deemed it in the children's best interest; and neither case where the reference appears involved a vagueness challenge. A shorthand reference to the need for misconduct certainly cannot be taken to mean that the statute is sufficiently precise when it fails to define the kind of unfitness that justifies termination of parental rights.

C. The Burden of Proof Is Unconstitutional.

The Does' opening brief showed that, at the very least, clear and convincing evidence is necessary to support

[5]See, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Baker v. Carr*, 369 U.S. 186

[6]In *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977), Mr. Justice Stewart said in his concurring opinion that the state could not break up a natural family without some showing of unfitness and for the sole reason that the breakup was thought to be in the children's best interest. The same language was subsequently quoted in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), a decision generally damaging to the State's position. See Doe Br. 16, 36.

termination of parental rights. That requirement is consistent with *Addington v. Texas*, 441 U.S. 418 (1979), with numerous state decisions and statutes (Doe Br. 32), with the most modern model code (Doe Br. 33), and with the rationale that has informed this Court's decisions on burden of proof requirements. Doe Br. 26-27. Indeed, the principal federal statute—the Indian Child Welfare Act—requires proof beyond a reasonable doubt for termination of parental rights. Doe Br. 33.

The State's brief argues that clear and convincing evidence is not required because the parents' interests are opposed to those of the children and a clear and convincing standard would prefer the former to the latter. State Br. 25. This argument begs the very question at issue in TPR proceedings, for the parents' and children's interests may well be identical: both may be resisting the meddlesome and unwarranted intrusion of the state bureaucracy. In all events, the reason for requiring more than a preponderance of the evidence is not to prefer the interests of either the parents or the children. It is to emphasize for the fact finder the drastic consequences of a TPR judgment, to reflect the constitutional premise that maintenance of the family unit is the preferred solution, and to impose a consonantly heavy burden upon anyone seeking to sever the family.

The State also argues that the constitutional error should be disregarded because the parents below argued for proof beyond a reasonable doubt rather than clear and convincing evidence. In fact, the Does' argument was a broader one designed to secure an evidentiary "standard beyond a mere preponderance." Doe Reply Br. 17. While the Does supported a requirement of proof beyond a reasonable doubt, they expressly cited the adoption of a clear and convincing standard in both the *Addington* decision and in

the *Alsager* case.[7] In addition, since the Delaware Supreme Court expressly rejected any higher requirement than preponderance of the evidence, it is apparent that the central question was in fact litigated and decided below.

Finally, if the Court concludes—as we believe is likely—that the Delaware statute is unconstitutionally vague, Delaware and a number of other states will have to revise their existing statutes. In doing so, it would clearly be useful for the states to know whether a higher burden of proof is required and what that burden is, so that the new statutes can be shaped accordingly. This is a further reason for seeking to resolve definitively the burden of proof issue, which was properly raised below.

D. A Finding of Harm Is Constitutionally Required.

There was below no finding that the Doe children had suffered or would imminently suffer significant harm from remaining with their parents. The focus of the decisions below was on parental conduct in the abstract (unemployment, half-sibling relationship of the parents, relocations); and a decision that the children's "best interests" would be served by termination is *not* equivalent to finding that the parents are incapable of raising their children without significantly harming them. See *Quilloin v. Walcott, supra,* 434 U.S. at 255. A finding of harm is a minimum prerequisite of substantive due process in view of the protected nature of the family relationship and the lack of any other

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[7]Doe reply brief (p. 21) in the Delaware Supreme Court, citing *Alsager v. District Court,* 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam,* 545 F.2d 1137 (8th Cir. 1976), as requiring "clear and convincing evidence" in termination; Doe motion for reargument (pp. 8-10) in the Delaware Supreme Court citing *Addington,* together with state cases requiring clear and convincing evidence.

proper basis for forcibly terminating parental rights and duties. See Doe Br. 34-44.

While the State's brief argues that no "compelling" state interest need be shown to justify termination, this Court's constitutional decisions protecting family autonomy clearly do require a compelling state interest to justify drastic intervention. Doe Br. 35 & n.58. Even if some less demanding test were applied, in a TPR context nothing other than a finding of harm could bear a "rational relationship" to a legitimate state purpose. To take children from their parents merely to punish conduct deemed improper, but not shown to harm the children, would be manifestly cruel and unusual (see Doe Br. 37 n.61); and this Court in the *Quilloin* case specifically rejected the notion that termination could be justified merely to secure what state officials deemed to be the children's best interests. 434 U.S. at 255.

The State also argues that harm was in fact done to the children (State Br. 30) but its contention rests on fragments of disputed evidence and not on any *finding* of harm by the trial court. At the very least, the requirement that harm be found means that harm must be found *explicitly* by the trier of fact and that the finding must be supported by evidence.[8] An ultimate finding in explicit terms, together with a statement of supporting facts, is hardly too much to demand of a trial court before a family is involuntarily divided and children permanently taken from their parents.

The State contends that the substantive due process issue was not raised below in proper fashion. There is no dispute that the Does did argue for a requirement of harm, denominating their constitutional objection to the lack of harm as one based on "substantive due process." Doe motion for

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[8]See, *e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (required finding of malice or recklessness in public figure libel case); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (finding of danger to self or others required for confinement for mental illness).

reargument in the Delaware Supreme Court (pp. 11-12).[9] In all events, the lack of such a finding is plain constitutional error which this Court is entitled to consider in a case otherwise properly before the Court on related issues.[10] Given the states' need for guidance in any effort to enact more specific statutes, the resolution of this issue is doubly appropriate.

II.

THE FURTHER ISSUES RAISED BY THE STATE OR AMICI DO NOT ALTER THE APPROPRIATE DISPOSITION.

A. The Change in Statutory Language Does Not Affect the Case.

On June 30, 1980, after the Does had filed their opening brief and after this Court had recessed for the summer, the Delaware legislature enacted without public hearings new statutory language (reprinted in State Br. App. B) revising the unfitness standard—but not the best interests standard—utilized in the preexisting statute. While the new unfitness standard is slightly more complex, the changes are essentially cosmetic from the standpoint of this case. The new standard continues to turn on language of extraordinary vagueness ("plan adequately" for "physical needs" or

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[9]It was not until the Delaware Supreme Court finally rejected the Does' argument as to how the statute should be construed under state law that this constitutional issue could be definitively presented.

[10]See Sup. Ct. R. 34.1(a). *E.g., Washington v. Davis,* 426 U.S. 229, 238 (1976).

"emotional health or development");[11] no finding of harm is required;[12] and there is no requirement that proof be by evidence beyond a mere preponderance.

Enactment of the statute does not in any way moot the present case—and the State does not claim otherwise—nor lessen the need for a swift resolution on the merits of the Does' rights and status. The TPR judgment entered below remains based upon an unconstitutional statute and procedure. The parents have been separated from their children for five years; and if there is any further significant delay in moving toward resolution, the Doe children, taken from their parents as infants and still comparatively young, will be teenagers before this litigation is concluded.

Nor does the change in statutory language reduce the public interest in a swift resolution of the basic legal issues presented. The constitutional burden of proof and substantive due process issues are not affected *in any way* by the statutory change; and vagueness inheres in the new adequate planning language to almost precisely the same degree as in the unfitness language. All of these constitutional defects persist in the statutes of a significant number of states, including Delaware, affecting thousands of cases every year. As this Court implicitly recognized in noting probable jurisdiction, these defects present significant constitutional issues that need to be answered now.

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[11]For children like the Does not in the home of a stepparent or blood relative, the new standard in substance replaces the old phrase "not fitted" with the phrase "are not able, or have failed, to plan adequately for the child's physical needs or his mental and emotional health and development." Although there are additional conditions, they do not clarify or refine the concept of adequate planning on which the TPR statute now pivots.

[12]On the contrary, far from requiring significant harm either present or imminent, the adequate planning criterion sounds suspiciously like a social worker's predictive judgment; and at best, it resembles the best interests standard which this Court has said is not sufficient basis for termination.

B. No Right to Counsel Claims Are Properly Presented.

Two distinct right to counsel arguments are advanced by various of the amici. One argument is that children in a TPR proceeding are entitled to separate counsel at the evidentiary hearing, as some lower courts have held. *E.g.*, Legal Aid Br. 7. The other argument is that the present case cannot proceed to judgment in this Court until separate counsel for the children are appointed to brief and argue the issues presented. See NACC Br. 7.

The need for separate counsel in TPR hearings may deserve review by this Court, but not at the present stage of the present case. The issue was not litigated below or decided by the lower court. It was not briefed in this Court by the Does, and the State's substantive discussion of the issue is confined to a single paragraph and refers only to one of the many pertinent precedents. State Br. 22. In view of the widespread impact of requiring separate counsel in all TPR cases it would be inappropriate to decide the issue in the present context.

The quite different suggestion of one of the amici (NACC)—that separate counsel is now required *in this Court* in this case—is frivolous. Whatever role separate representation of the children might play in a trial court evidentiary hearing, a requirement of separate counsel to brief and argue now could contribute nothing (other than delay) in resolving the clear-cut legal issues presented by this case. If there are more than two viewpoints on the merits issues, the amici have already had ample opportunity to submit such views from the perspective of those who represent children, so the Court already has the benefit of that perspective.[13]

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[13]NACC's citation (p. 7) to the Federal Rules of Civil Procedure is inapt as they do not apply in this Court (see Fed. R. Civ. P. 1), and there

(continued)

C. No Issue of Retroactivity Is Properly Presented.

The same amici brief suggests that, even if the Does' parental rights were unconstitutionally terminated and this Court so holds, it may be inappropriate to give the Does the benefit of the constitutional holding. NACC Br. 23-34.[14] Where constitutional objections have been asserted in a TPR proceeding and pursued vigorously by direct appeal, no basis exists—if the constitutional objections are sustained—for depriving the litigants of the benefits of such a resolution in their own case. However the Court might later resolve other situations (*e.g.*, collateral attacks in cases where the TPR decision has become final and no longer subject to direct review), no retroactivity issue is presented in this case.[15]

NACC's citations to federal cases alleged to support possible "non-retroactivity" are misleading to a remarkable degree. Two of the cited cases,[16] which did concern parental

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(footnote continued from preceding page)
is no principle that forbids adjudication of an issue in an appellate court because unrepresented persons may be affected. Compare NACC Br. 16. Determinations by this Court definitively affect absent parties all the time (*e.g.*, other litigants with pending or future cases presenting identical legal issues).

[14]Although the NACC brief refers to this as a question of retroactive or non-retroactive application, it is not normally deemed a retroactive application of a rule of law to apply it to the party who asserted that position in the trial court and vindicated his or her position on direct appeal.

[15]The requirements of specificity, clear and convincing evidence, and harm are designed not to achieve extrinsic purposes but to achieve a just verdict on the merits. *Cf. Brown v. Louisiana,* 48 U.S.L.Wk. 4719 (U.S., June 16, 1980).

[16]*Syrovatka v. Erlich,* 608 F.2d 307 (8th Cir. 1979); *State v. Lutheran Social Services,* 178 N.W.2d 56 (Wis. 1970), *vacated and remanded,* 405 U.S. 1051 (1972).

rights, involved indirect attacks through habeas corpus on previous final terminations or adoptions. Such cases therefore present a conventional issue of retroactivity precisely because—unlike the present case—the state action sought to be undone had previously become final and was no longer subject to direct appeal. The other principal case cited, *Lemon v. Kurtzman,* 411 U.S. 192 (1973), did not involve parental rights at all but, as the Court explicitly stressed, the fashioning of an equity decree based upon the "broad discretionary power" that governs such relief. See *id.* at 199-201.

If this Court does find constitutional error in termination of the Does' parental rights, then the proper disposition is to order the reversal or vacation of the TPR decree. The Does will not, of course, have an immediate legal right to regain custody of their children since custody orders are outstanding. On the other hand, the State's brief has misrepresented the Does' position in claiming that they seek only "simple 'contact' " with their children, which (the State implies) will disrupt adoption proceedings that might otherwise occur. State Br. 10. See also *id.* at 12.

After reversal or vacation, the State remains free to bring a TPR proceeding consistent with constitutional requirements; and the parents remain free to seek not only contact but custody of their children through appropriate proceedings. Once the stigma and barrier of the TPR decree are removed, it is always possible that the case can be resolved without further litigation. The Does cannot judge what course may be best for them and their children until they learn what has become of their children. Only the tone of the State's brief makes it necessary to add that the Does have not maintained this litigation, through two hearings and three appeals over the course of five years, in order to cause injury to their own children.

CONCLUSION

For the reasons stated above and in the Does' opening brief, the judgment below should be reversed.

Respectfully submitted,

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